Supreme Court, U.S.
FILED
MAY 18 2004
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(6)

No. 03-1397

IN THE

Supreme Court of the United States

CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH, AND CIVIL LIBERTIES FOR URBAN BELIEVERS,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

JOHN W. MAUCK
RICHARD S. BELL
MAUCK & BAKER
Suite 2001
One North LaSalle Street
Chicago, Illinois 60602
(312) 726-1243

CARTER G. PHILLIPS
GENE C. SCHAERR*
REBECCA K. WOOD
DAVID S. PETRON
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

May 18, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Respondent's opposition merely reinforces the conclusion that the issues presented in the petition merit this Court's review. Respondent, for example, nowhere disputes the vital practical importance of these issues to American religious life and, indeed, to zoning bodies throughout the Nation—a point emphasized in the two *amicus* briefs from religious organizations supporting petitioners, see Br. of American Jewish Congress *et al.*; Br. of the Becket Fund for Religious Liberty *et al.* Even more important, respondent admits that the federal courts of appeals and highest state courts are divided on the issues raised by the petition. Although respondent seeks to minimize these conflicts by arguing that they are "minor," Opp. 6, 21, it does not and cannot deny that the conflicts are real. And respondent's argument that resolution of these conflicts could have no effect in this case—or other cases around the country—improperly assumes that a jury would believe the evidence presented by respondent, who won summary judgment below, rather than the extensive, contrary evidence presented by petitioners.

I. THE FIRST QUESTION WARRANTS REVIEW, ALONG WITH THE INCLUDED QUESTION ABOUT THE STATUS OF "HYBRID RIGHTS."

1. Respondent utterly fails to undermine petitioners' showing—recognized by Judge Posner below—that this case creates a square conflict in the circuits about whether religious (and other "sensitive") land uses are entitled to some degree of heightened review that is "more alert for unjustifiable discrimination" than bare rational basis review, in light of *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Pet. App. 26a-28a; see Pet. 10-19. Respondent's argument that *Cleburne* applied nothing more than ordinary rational basis review is flatly contradicted, not only by the analysis in that decision as explicated by Judge Posner, but also by *Cleburne*'s separate opinion, which noted without

contradiction: "[H]owever labeled, the rational-basis test invoked today is most assuredly not the [ordinary] rational-basis test." *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in judgment in part and dissenting in part). Respondent's interpretation of *Cleburne* is also rejected by numerous circuit court opinions recognizing that *Cleburne* applied a more rigorous version of rationality review. See, *e.g.*, *Romas* v. *Town of Vernon*, 353 F.3d 171, 175 (2d Cir. 2003); *Able* v. *United States*, 155 F.3d 628, 634 (2d Cir. 1998); *Milner* v. *Apfel*, 148 F.3d 812, 816-17 (7th Cir. 1998).

Respondent also fails in its attempt to escape Judge Posner's conclusion that the decision below conflicts with the decisions of other courts of appeal in the land-use context. See Pet. App. 26a, 28a; Pet. 11-13. For example, as we explained in the petition (at 11)—and as respondent does not dispute—the Eighth Circuit in *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 471 (8th Cir. 1991), relying upon *Cleburne*, imposed on the *government* the burden of establishing the rationality of any differential treatment between churches and non-commercial assembly uses. This of course is a departure from the usual rule that, where rational-basis review applies, the *plaintiff* bears the burden of demonstrating the irrationality of the differences. *E.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.") (internal quotation marks omitted). Here, in a clear departure from both *Cleburne* and *Cornerstone*, the Seventh Circuit placed this burden squarely on petitioners' shoulders. Pet. App. 22a-23a.

Respondent likewise fails to rebut the conclusion that the decision below conflicts with the Third Circuit's decision in *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120 (3d Cir. 2002). There, not only did the court direct that the government would bear the burden of justifying any proven differences in treatment between religious and non-religious

uses (the subject of the court's remand), but it also held that the level of scrutiny must depend upon the magnitude of the difference: "as the similarity of use wanes, so too the inequality in treatment will be increasingly tolerated." *Id.* at 142. Thus, Judge Posner was clearly correct in concluding that the decision below conflicts with both *Kol Ami* and *Cornerstone*.[1]

2. Respondent also errs in suggesting that resolution of this issue in petitioners' favor would not affect the outcome here. Because respondent was granted summary judgment in the district court, reversal is now required if—evaluated under the correct legal standard for the equal protection challenge in this case—there is any genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). Further, because summary judgment was granted against petitioners, under well-established standards, petitioners' "version of any disputed issue of fact . . . is presumed correct" and "'all justifiable inferences are to be drawn in [petitioner's] favor.'" *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Here, petitioners presented ample evidence to defeat summary judgment under the heightened rationality standard applied in *Cleburne*, *Kol Ami*, and *Cornerstone*. To take but one striking example, respondent ignores petitioners' summary judgment affidavit from planning expert Robert Larson, which shows that churches are in fact treated worse than

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[1] Respondent's suggestion that this conflict has been resolved by *Locke* v. *Davey*, 124 S. Ct. 1307 (2004), is frivolous. *Locke*, which dealt only with public funding for the training of religious ministers, cannot reasonably be read to hold that *all* religious discrimination is subject to bare rational-basis review. And if it could, the sweeping consequences of such a conclusion would be an additional reason to grant review here. Moreover, *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and *United States* v. *Lee*, 455 U.S. 252 (1982), involve free exercise challenges, not an equal protection challenge like petitioners' claim here.

similarly situated assembly uses even though they require similar property features. Reply App. 1a-5a. Specifically, many churches' needs for visibility, accessibility, and size can often be met only in commercial, business or manufacturing zones. *Id.* at 2a-3a (¶¶ 4-6). Most residential zones in Chicago fail to meet these requirements and are therefore unsuitable for many churches. *Id.* Moreover, properties in commercial or business zones used by similarly situated assembly uses—such as community centers, assembly halls, lodges, and clubs—are ideal for churches, yet churches face additional obstacles which other, non-religious assembly uses do not. See *id.* at 3a (¶ 6).[2]

Especially when this evidence is viewed in the light most favorable to petitioners—as it must be on appeal from summary judgment—it is sufficient for a reasonable jury to find that respondent's zoning scheme, both on its face and as applied, treats religious uses worse than similar non-religious uses. Under the interpretation of *Cleburne* reflected in *Kol Ami* and *Cornerstone* (and in Judge Posner's dissent), such a showing is sufficient to require something more than bare rationality review. And because respondent itself does not claim it would be entitled to summary judgment under a heightened standard, it can hardly claim that an application of that standard would make no difference here.[3]

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[2] Contrary to respondent's argument, Opp. 9-10, petitioners' evidence is also sufficient to create a material issue of fact on the kind of discrimination pointed out by Judge Posner—in favor of older religious communities and against newer ones, Pet. App. 29a. As petitioners' real estate expert made clear in an affidavit before the district court, "it is almost, if not completely, impossible to find a parcel of vacant land large enough to build a church in a residential zone." Reply App. 6a, 8a (¶¶ 7, 11). Accordingly, new churches are "categorically or discretionarily excluded" from land in the remainder of the city because "the land the Zoning Ordinance makes freely available to churches [in residential zones] is completely inadequate." *Id.* at 8a (¶ 12).

[3] Contrary to respondents' waiver argument (Opp. 7), petitioners' brief to the Seventh Circuit (at 39-44) urged that petitioners should prevail un-

3. Respondent is also incorrect in contending that the Court cannot use this case to resolve what respondent admits is a sharp conflict among the federal circuits as to the status of the "hybrid rights" doctrine alluded to in *Employment Division* v. *Smith*, 494 U.S. 872, 881-82 (1990). The first question presented asks "whether an equal protection challenge to a land-use regulation implicating uses protected by the First Amendment, such as religious uses, must be analyzed under the same 'rational basis' scrutiny as economic regulations implicating no fundamental rights." Pet. (i). Judge Posner's interpretation of *Cleburne* provides one obvious way of answering that question in the negative. But so does the hybrid rights approach: The addition of a colorable equal protection claim to a colorable free-exercise challenge results in a claim that is, at least in part, an "equal protection challenge" within the meaning of the first question presented. And if the hybrid-rights approach is valid, then it too provides an independent basis for a negative answer to that question. The hybrid-rights point is, therefore, "fairly included" in the first question presented. See Sup. Ct. R. 14.1.[4]

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der *both* "strict scrutiny" and rigorous rationality review of the kind employed in *Cleburne*, *Kol Ami* (then at the district court) and *Cornerstone*. Petitioners then reiterated this argument in a 28(j) letter, explicitly addressing whether "'*Cleburne* is more exacting than the standard version' of rational-basis scrutiny" and repeating that treating similar assembly uses differently fails the "more precise [rational basis] requirement in *Cleburne*." Pet. 28(j) Ltr. 1 (Jan. 28, 2003). In all events, this issue was squarely decided by the court below. *See, e.g.*, *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented . . . .").

Moreover, respondent's argument that petitioners' challenge to the earlier version of the ordinance is moot ignores the fact that damage claims remain as to that version, as we explained in the petition. *See* Pet. 5 n.2.

[4] Respondent is also wrong in contending that there is "no meaningful difference," Opp. 19, between the Ninth and Tenth Circuits' "colorability" standard for companion clams to support a hybrid rights challenge, *see* Pet. 18-19 (citing cases), and other circuits that either have rejected hybrid rights outright or demanded that the companion claim be fully meritorious

II. THE SECOND QUESTION DEMANDS REVIEW.

Respondent has also failed to rebut our showing that the second question presented—the proper application of the "substantial burden" concept—is the subject of a square conflict and thus requires review by this Court.

1. As demonstrated in our petition, a conflict currently exists between courts which, like the Seventh Circuit, would require religious practice to be rendered essentially impossible—*i.e.*, "effectively impracticable"—to create a substantial burden, and those that take a more moderate position, in keeping with the Court's *Sherbert* line of cases, that a tendency to coerce or a significant increase in the cost of religious observance is sufficient. See Pet. 19-25. Since the petition was filed, that split has become even more pronounced, with the Eleventh Circuit expressly "declin[ing] to adopt the Seventh Circuit's definition" of substantial burden. *Midrash Sephardi, Inc.* v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527, at *9 (11th Cir. Apr. 21, 2004). Instead, the Eleventh Circuit looked to the *Sherbert* line of cases, and held that a substantial burden merely "requires something more than an incidental effect on religious exercise," such as "pressure that tends to force adherents to forego religious precepts." *Id.*

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on a freestanding basis, *see id.* at 16-17 (citing cases). Contrary to respondent's suggestion, Opp. 20, the Seventh Circuit did not find that the Ninth and Tenth Circuits' approach was identical to its own. The Seventh Circuit simply ignored the conflict. This difference in standards is important given Judge Posner's correct conclusion that there is sufficient evidence to establish an equal protection violation, which can serve as a "companion" to petitioners' free-exercise claim. *See* Pet. 19.

Respondent's assertions that an equal protection challenge cannot be the predicate for a hybrid rights claim is likewise incorrect. Although *Smith* cited the most common companion claims—free speech and the right to direct the education of one's children—it did not close the door to a hybrid rights claim based on the Equal Protection Clause. And, *Cornerstone* recognized that a hybrid rights claim could be based on a companion equal protection challenge. *See* 948 F.2d at 473.

Implicitly recognizing this conflict, respondent concedes that "the circuits have used various formulations to describe what amounts to a substantial burden." Opp. 21. Respondent focuses instead on the unsurprising fact that—as would be expected from a "substantiality" standard—some plaintiffs cannot make out a case for substantial burden even under the lower standard. See *id.* at 21-23. But even if the outcome is the same under different standards in the circumstances of certain cases, that does not show that the legal standards are the same, much less that a different standard would not have mattered here. That difference is dispositive.[5] See *infra*.

2. Respondent's effort to distinguish the decisions that conflict most obviously with the decision below is as unpersuasive as it is irrelevant. For example, respondent does not dispute that the standard articulated by the Tenth Circuit is *not* whether religious exercise is rendered "effectively impracticable"—the Seventh Circuit's standard—but whether the burden is one that would "significantly inhibit or constrain," "meaningfully curtail" or deny "reasonable opportunities" for religious practice, that is, whether the burden has a "'*tendency* to coerce individuals into acting contrary to their religious beliefs.'" *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). Contrary to respondent's suggestion, it makes no difference that the particular burden there—relocating a grave site to make way for a highway project—ultimately was not found to meet this standard on the record presented there.

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[5] Respondent also attempts to avoid this conflict by recasting the question presented, contending that "there is no conflict in the lower courts on the question whether a zoning law that directs churches to residential zoning districts imposes an impermissible burden on religion." Opp. 24. But the question presented in the petition turns not on the outcome of the application of the standard to a given set of facts, but on whether the circuits (and states' highest courts) employ different standards and what that standard should be. As to this question, respondent acknowledges as it must that these courts have used "various formulations." *Id.* at 21.

Nor can respondent avoid the Fifth Circuit's decision in *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988), by attempting to cabin it as a mere discrimination case. That court concluded that zoning laws—such as the one here—that make religious assemblies "relatively inaccessible within the city limits" and thereby ensure that "churches, synagogues, and mosques [become] accessible only to those affluent enough to travel by private automobile," create an "obvious[] burden [on] the exercise of religion by the poor," *id.* at 299, regardless of whether religious practice is rendered virtually impossible. The fact that the court in *Starkville* also found evidence of discrimination does not undermine its holding, in square conflict with the decision below, that a burden need not make religious exercise impossible to be considered "substantial." *Id.* at 299-300.

3. Respondent's half-hearted attempt to distinguish the decision of the Washington Supreme Court in *First Covenant Church* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992), highlights another fundamental flaw in its opposition. Specifically, it improperly assumes that disputed factual issues are to be resolved in favor of *respondent* rather than the party against whom summary judgment was granted, *i.e.*, petitioners. See, *supra*, at 3. Respondent recognizes that the court in *First Covenant* held—contrary to the decision below—that "a *financial* burden on religious activity, if too gross, may unconstitutionally infringe on free exercise," 840 P.2d at 183 (emphasis added), even if it does not make religious observance impracticable. *Id.* at 184. Yet respondent attempts to distinguish the decision solely on the ground that "[t]here is no comparable evidence in this case of the financial impact of Chicago's ordinance on petitioners." Opp. 24.

But respondent is as wrong on that score as it is in belittling the burdens petitioners endured as merely "incidental," and thus arguing that petitioners would not benefit from a more robust definition of "substantial burden." *Id.* at 26. In fact, the record is replete with sworn evidence about the significant

burdens on petitioners and the corresponding tendency to coerce them to forgo aspects of communal worship, see Reply App. 11a-13a (¶¶ 27-28), which, as *Starkville* recognized, are fundamental to their religious practice. 840 F.2d at 300 ("[t]he assembly of a community of believers is an integral part of most religious faiths").[6]

Nor is it any answer to point to churches being "permitted uses" in residential zones. In fact, petitioners presented evidence that it is virtually impossible to find a parcel of vacant land large enough to build a church in a residential zone, Reply App. 6a-8a (¶¶ 7-11), and that, even where land is available, it does not offer the visibility and accessibility many churches need, *id.* at 2a, 3a (¶¶ 4, 6). Thus—assuming petitioners' facts as true and giving them the benefit of all reasonable inferences, *e.g.*, *Eastman Kodak Co.*, 504 U.S. at 456—there can be no doubt that a less grudging standard of "substantial burden" would make a difference here.

3. It is equally clear that petitioners' evidence, evaluated under the proper summary judgment standard, is sufficient to establish a "substantial burden" as that term has been used in decisions of this Court such as *Sherbert* v. *Verner* 374 U.S.

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[6] Petitioners presented evidence, for example, that "the Chicago Zoning Ordinance places a heavy burden on churches seeking to expand or locate a facility in the City of Chicago" and that "[t]he special use permit requirement under zoning ordinances . . . creates significant difficulties for churches" such as substantial "expense" and exposure to "religious, racial, ethnic, or socioeconomic biases." Reply App. 3a-4a (¶¶ 7-8). The evidence further shows that these burdens not only had a tendency to deter religious worship and other religious conduct, but in fact did so. For example, as a result of a two-year fight over a special use permit, Christian Bible not only "paid substantial sums in expenses," but also "suffered a decrease in membership." Pet. App. 49a. And similar evidence was offered on behalf of, among others, petitioner Monte de Sion, *id.* at 14a (¶ 11), and petitioner CLUB's member churches, *id.* at 15a (¶ 2h); *see also id.* at 16a (¶ 22) (Christian Bible). A decline in membership and attendance clearly provides a basis for a reasonable jury to conclude that those regulations have a tendency to discourage or deter religious activity, even if they do not make worship impossible.

398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981). That is because it creates a triable issue as to whether Chicago's zoning scheme has a "*tendency to inhibit* constitutionally protected activity"—in this case, communal worship. 374 U.S. at 404 & n.6 (emphasis added).

Contrary to respondent's suggestion, moreover, Opp. 26-27, nothing in *Corporation of Presiding Bishop* v. *City of Porterville*, 203 P.2d 823 (Cal. Ct. App.), *appeal dismissed*, 338 U.S. 805 (1949), or *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950)—which preceded the *Sherbert* line of cases and RLUIPA—indicates that zoning schemes are incapable, as a matter of law, of imposing a substantial burden on religion. Certainly the lower courts that have upheld substantial burden challenges to zoning decisions have not found those decisions to be an impediment.

4. Finally, respondent is wrong in contending that the "individualized assessments" issue—as to which respondent acknowledges a conflict—is not fairly encompassed in the petition. Opp. at 24 n.10. Petitioners' second issue presented seeks clarification of the meaning of "substantial burden" under the Free Exercise Clause as well as RLUIPA. To find that the "substantial burden" analysis even applies under the former provision, the Court would first need to determine that this case falls within the "individualized exemptions" exception to the general rule of *Smith*. See 494 U.S. at 884. Thus, this issue is a "predicate to intelligent resolution" of the substantial burden issue. *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). Accordingly, the Court can and should take this opportunity to resolve this vexing question of federal law as well. See generally Br. of the Becket Fund for Religious Liberty *et al.*

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN W. MAUCK
RICHARD S. BELL
MAUCK & BAKER
Suite 2001
One North LaSalle Street
Chicago, Illinois 60602
(312) 726-1243

CARTER G. PHILLIPS
GENE C. SCHAERR*
REBECCA K. WOOD
DAVID S. PETRON
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

May 18, 2004

APPENDIX

APPENDIX

RECORD EXCERPTS

In the U.S. District Court
For the Northern District of Illinois

C.L.U.B. (CIVIL LIBERTIES FOR URBAN BELIEVERS), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CENTER, CHURCH ON THE WAY PRAISE CENTER, MONTE DE SION (MOUNT ZION) CHURCH, AND LIVING WORD MINISTRIES,

PLAINTIFFS,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS, PATRICK HUELS, WILLIAM BANKS, AND OTHER ALDERMAN,

DEFENDANTS.

NO. 94 C 6151
JUDGE ANDERSEN
MAGISTRATE JUDGE GUZMAN

AFFIDAVIT OF EXPERT WITNESS
ROBERT CARL LARSON

1. I am over 21 years of age and competent to make this statement.

2. I received my Ph.D. in urban planning from the University of Washington in 1970. My dissertation title was *Institutional Location—A Market Theory and Automated Geocoded Methods with Particular Reference to Churches.*

3. I have over 30 years of experience in church issues as they relate to zoning and urban planning. I was Director of Urban Church Planning for the Evangelical Covenant Church, Chicago, Illinois from 1969-78, and Executive Secretary of the Department of Church Growth and Evangelism from 1979-1990. I have also held various pastoral positions from 1958-1993 and served as an adjunct professor at North Park Theological Seminary in Chicago from 1969-1990. I have been a consultant on real estate issues for churches since 1960. I am a full member of the American Planning Association and its American Institute of Certified Planners. A summary of my qualifications is attached hereto as Exhibit A.

4. In my experience, the modern Christian Church needs to be visible, accessible, and large enough to host a variety of activities. Visibility is required to attract new members and persons cannot receive the services of the church unless the church is also accessible. Facilities that are required include a large open space for large assemblies for worship and prayer, classrooms and nursery services for the education and training of adults and youth requiring smaller meeting rooms, and office space for the pastors and staff. Churches are like businesses which require visibility and accessibility to attract and service its clientele, adequate space to serve their customer base, and offices for administration.

5. In order to meet the requirements of visibility, accessibility, and size, church facilities are properly located on main thoroughfares with space for a large building and plenty of parking. In mature cities, such as Chicago, such parcels of land are typically located in a given city's commercial, manufacturing, and business zones and less likely to be available in residential zones. Commercial, manufacturing, and business zones are also better suited for church use because the needs of any given congrega-

tion will require a wide variety of building shapes and sizes.

6. As a result of my decades of experience with church planning centralized in the City of Chicago, I am keenly aware of the impact of the Chicago Zoning Ordinance on churches. The only zones where churches are a permitted use are in residential zones. However, the residential zones do not provide churches with the visibility, accessibility, and space that they need to function. Also, the increased traffic and parking concerns can negatively impact neighboring residential uses. In contrast, Chicago's business, commercial, and manufacturing zones provide ample visibility and accessibility. Existing buildings in business, commercial, and manufacturing zones, especially those designed for assembly, such as theaters, community centers, assembly halls, lodges, and clubs, are often ideally configured for church use while existing non-church facilities in residential zones are often too small or require extensive renovation prior to church use. Also, if a church located in a residential zone fails, the building has few if any uses, except for another church. In contrast, buildings in commercial zones can be reused by different businesses and churches. Further, church parking concerns are less of an issue in business, commercial, and manufacturing zones since churches' main hours of operation are on evenings and weekends, while businesses operate primarily 9 a.m. to 5 p.m. on weekdays.

7. It is my opinion that the Chicago Zoning Ordinance places a heavy burden on churches seeking to expand or locate a facility in the City of Chicago, which could be remedied by permitting churches to freely locate in certain business, commercial, and manufacturing zones and may be a burden on adjacent residential uses if the church fails.

8. The special use permit requirement under zoning ordinances in general and the Chicago ordinance in particular creates significant difficulties for churches in that:

   A. a church is at a competitive disadvantage relative to others who would seek to acquire the same properties but have no need to acquire a special use permit;

   B. sellers of land or buildings which a church is seeking to acquire and which require a special use permit prefer to sell to other parties, who do not need a special use because of the greater certainty the sale will be consummated and the possibility that the sale will close sooner;

   C. the expense of the special procedure such as filing fees, appraiser costs title charges, certified mail expenses, and attorneys fees;

   D. the political involvement of aldermen and neighbors allows factors such as religious, racial, ethnic, or socioeconomic biases to effect the outcome in some circumstances; and

   E. in the event the church feels it is improperly denied a special use permit, judicial protection is often unavailable as a practical matter because in many if not most cases:

      i. the seller will not agree to keep the property off the market the many months or several years necessary for litigation;

      ii. mortgage financing is not available because the lender does not feel secure without a definite legal right of the borrower to use the property; and

      iii. the expense of owning the property while not being able to use it or rehabilitate it for church use can be enormous.

9. I have studied and experienced the effects of churches upon surrounding properties in business, commercial, and manufacturing zones. Based upon these studies and that experience I am of the opinion that churches do not adversely affect the usability, value, or other attributes of beneficial enjoyment of such surrounding properties differently than recreation centers, meeting halls, funeral parlors, community centers, arenas, stadiums, or auditoriums because the essential function of such uses is as a place of assembly and the external effect of a place of assembly depends upon size of the assembly and intensity of the use rather than the content of the assembly.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 22 day of July, 1998.

Respectfully submitted,

/s/ Robert C. Larson
ROBERT CARL LARSON

SIGNED and SWORN to before me
this 22 day of July, 1998.

/s/ John W. Mauck [official notary seal]
NOTARY PUBLIC

In the U.S. District Court
For the Northern District of Illinois

C.L.U.B. (CIVIL LIBERTIES FOR URBAN BELIEVERS), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CENTER, CHURCH ON THE WAY PRAISE CENTER, MONTE DE SION (MOUNT ZION) CHURCH, AND LIVING WORD MINISTRIES,

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NO. 94 C 6151
JUDGE ANDERSEN
MAGISTRATE JUDGE GUZMAN

AFFIDAVIT OF EXPERT WITNESS MARIA ARBEEN

MARIA ARBEEN, being first duly sworn, deposes and testifies as follows:

* * * *

7. The only place where churches may freely locate without a permit in the City of Chicago are in residential districts. However, if a church wishes to build in a residential district, it is almost, if not completely, impossible to find a parcel of vacant land large enough to build a church in a residential zone. A recent computer search which I conducted revealed that there were 13 parcels of vacant land available for purchase which had a sufficient land area for a small con-

gregation of 70 to build a church. (Ex. B) However, not all of these lots were deep enough or located in the general area that a church would necessarily find desirable. In my experience, existing buildings suitable for conversion to church use by the small congregation described above in residential zones are likewise scarce. In contrast, there were 37 such vacant parcels in business, commercial and manufacturing zones. However, I believe there are many more business, commercial, and manufacturing properties available since most brokers specializing in such properties do not use the Multiple Listing Service.

8. At a minimum, I would estimate that a medium sized congregation of 500 persons requires approximately 8 city lots in which to build a facility and parking lot which satisfies the City of Chicago Building Code requirements. Three lots are needed for the facility and five extra lots for the 42 required parking spaces. (Forty-two spaces are required at 300 square feet a space.)

9. Vacant land available to accommodate the church building needs of a medium sized congregation of 500 is even more scarce. A recent computer search which I conducted revealed that there were 3 parcels of vacant land available for purchase in residential zones on which a medium sized congregation of 500 could build a church under the City of Chicago zoning requirements. In contrast, there were 15 such vacant parcels in business, commercial, and manufacturing zones. However, I believe there are many more business, commercial, and manufacturing properties available since most brokers specializing in such properties do not use the Multiple Listing Service.

10. In addition, most congregations require additional parking and a centralized location because a significant number of those in the congregation drive or take public transportation to church. This pattern of congregants driving to church increases the need for parking. If a congregation of 500 wishes to provide adequate parking of one space for

every three seats, then three lots will be required for the facility and seventeen lots will be required for parking (one hundred sixty-seven spaces are required at 300 square feet per space.) Zero parcels of land were found in residential zones of this size. In contrast, there were 3 such vacant parcels in business, commercial, and manufacturing zones. However, I believe there are many more businesses, commercial, and manufacturing properties available since most brokers specializing in such properties do not use the Multiple Listing Service.

11. Available existing church buildings in good condition are extremely scarce. In my experience, when a church building goes on the market in Chicago, it receives approximately 30-40 inquiries in the first 2 months and is sold in the first month. A decent church will be sold in about 10 days, and if a decent church is priced appropriately it can be sold in one day. However, most of the churches on the market are in poor condition, lack adequate parking, or contain insufficient space for congregational needs. In recent months, I have been in contact with approximately 75-100 churches in Chicago alone that have been searching for an adequate permanent facility but have been unable to secure a facility due to the lack of buildings available for church use.

12. In my opinion, the City of Chicago Zoning Ordinance places an extremely heavy burden on congregations attempting to locate church buildings. This burden increases dramatically as the size of the congregation increases. Despite the fact that the land the Zoning Ordinance makes freely available to churches is completely inadequate, churches are either categorically or discretionarily excluded from ample and adequate land in the remainder of the City of Chicago.

* * * *

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 22nd day of July, 1998

/s/ Maria Arbeen
Maria Arbeen

SIGNED AND SWORN to before
me this 22nd day July, 1998

/s/ Carol A. Riley
NOTARY PUBLIC
[official notary seal]

In the United States District Court
For the Northern District of Illinois

C.L.U.B. (CIVIL LIBERTIES FOR URBAN BELIEVERS), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CENTER, CHURCH ON THE "WAY" PRAISE CENTER, MONTE DE SION (MOUNT ZION) CHURCH, AND LIVING WORD MINISTRIES,

PLAINTIFFS,

V.

CITY OF CHICAGO AND STATE OF ILLINOIS, PATRICK HUELS, WILLIAM BANKS, AND OTHER ALDERMEN,

DEFENDANT.

NO. CASE NO. 94 C 6151
JUDGE HIBBLER

PLAINTIFFS' STATEMENT OF UNCONTESTED MATERIAL FACTS REGARDING ALL SUMMARY JUDGMENT MOTIONS EXCEPT COUNT XII (HIS WORD REZONING)

All Plaintiffs by their attorneys Mauck, Bellande & Cheely, pursuant to Local Rule 56.1(a)(3) set forth material facts as to

which no genuine issues exist. These facts apply to all of the summary judgment motions filed by plaintiffs.

* * * *

Religious Practices Relating to Land Use

27. All members of C.L.U.B. and all individual church plaintiffs have the following activities which are an integral part of their beliefs and religious exercises:

    A. weekly assembly of the congregation to worship (Scrip. ref. Hebrews 10:25);

    B. weekly preaching - including speech relating to personal morality, God, social and political issues (Scrip. ref. 2 Timothy 4:2);

    C. pastoral counseling for the disturbed, lonely and brokenhearted;

    D. prayer meetings (Scrip. ref. Acts 1:13-14);

    E. singing and musical performances (Psalm 82:1-2);

    F. baptisms and/or confirmations, weddings, funerals and communion (Scrip. ref. Matthew 28:19-20; Luke 22:19);

    G. Bible studies; (Scrip. ref. 2Timothy 2:15)

    H. nurseries or crib rooms for infants and toddlers;

    I. youth activities, including games and sports;

    J. social gatherings such as church dinners;

    K. service projects for members of the congregation, the poor and the general community, such as gatherings for Alcoholics Anonymous, Girl Scouts, singles groups or seniors groups (Scrip. ref. James 1:27);

L. expression of their faith through the architecture of the house of worship, signs, crosses, paintings, windows, banners or decorations;

M. Evangelism - sharing the Christian message and persuading others to believe in Jesus, particularly those who visit their church meetings;

N. financial giving to support salaries, building costs, help for the poor, and ministries for the congregation;

O. administration (bookkeeping, financial, building upkeep, etc.) (Scrip. ref. Romans 12:6).

Third Amended Complaint ¶ 26, depositions of Pastors Wilkinson, Kantor, Llorena, Crossley, Acevedo, Garner, Lowery, passim and affidavits Ex. A1 to A8

28. The ability to conduct, the cost of conducting and the quality of each religious exercise listed in the preceding paragraph is significantly impacted by the type and location of building or facility each plaintiff congregation and member of C.L.U.B. located in Chicago has available, or may need to acquire, in the following ways:

A. number of people who can be accommodated;

B. availability of parking;

C. proximity to public transportation;

D. cost of building acquisition or rental;

E. cost of building repair and maintenance;

F. number, size and design of rooms such as nurseries, gymnasiums, pastoral offices, washrooms, kitchens and business offices;

G. safety for members and visitors and protection of church property;

H. appearance and aesthetics;

I. noise levels;

J. scope of and type of community service projects.

Third Amended Complaint ¶ 26, depositions of Pastors Wilkinson, Kantor, Llarena, Crossley, Acevedo, Garner, Lowery, passim and affidavits Ex. A1 to A8

* * * *

Respectfully,

/s/ John W. Mauck
John W. Mauck
Mauck, Bellande & Cheely, attorneys
for all Plaintiffs

John W. Mauck
MAUCK, BELLANDE & CHEELY
19 S. LaSalle Street, Suite 1203
Chicago, IL 60603
(312) 782-8188

J. Thomas Witek
Witek Law Offices
5600 North River Road, Suite 800
Rosemont, IL 60018

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF MOUNT ZION CHURCH
(IGLESIA DE AVIVAMIENTO MONTE DE SION)

I, Jose Acevedo, being sworn upon my oath, state that I am the Pastor of Iglesia de Avivamiento Monte de Sion and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

* * * *

11. When we lost the property on Pulaski, the congregation became discouraged because it seemed unlikely that we would be able to find a bigger meeting place. Some members of the church became so upset with our situation that they left the church.

* * * *

/s/ Jose Acevedo
Pastor Jose Acevedo

Subscribed and sworn to before me this 22 day of September, 1994.

/s/ Karen Hogenboom
Notary Public
[official notary seal]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF
CIVIL LIBERTIES FOR URBAN BELIEVERS

I, Theodore Wilkinson, being sworn upon my oath, state that I am the Chairman of the Board of Directors of Civil Liberties for Urban Believers ("CLUB") and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

* * * *

2. The member churches of CLUB are churches which have been damaged or suffered under the zoning ordinances of the City of Chicago in one or more of the following ways:

* * * *

h. They have lost membership and contributions due to their inability to find suitable property for which they could obtain a special use permit.

* * * *

Dated: September 13, 1994

/s/ Pastor Theodore V. Wilkinson

Signed and sworn to before me this 13th day of September, 1994.

/s/ Karen Hogenboom
Notary Public
[official notary seal]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF CHRISTIAN BIBLE CENTER

I, Jerone E. Lowrey, being sworn upon my oath, state that I am the Pastor of Christian Bible Center and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

* * * *

22. The emotional cost to the congregation has been extremely high. At one point during the process, in the summer of 1991, the Board seriously discussed dissolving the church, due to the untenable situation we were in and the opposition we faced. We have lost members, whose absence has been keenly felt in the programs of the church and in its budget. The current size of the congregation is approximately fifty adults, plus children.

/s/ Jerone E. Lowrey
Jerone E. Lowrey

Signed and sworn to before me this 14 day of September, 1994.

/s/ Karen Hogenboom
Notary Public
[official notary seal]